IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-828

DEMETRIA MOSES, CORRINE E. SMITH, TONJA PERRY, JOAN A. ABERNATHY, AND DONNA A. GAINES,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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To The Honorable Justices of the Supreme Court of the United States:

Petitioners Demetria Moses, Corrine E. Smith, Tonja Perry, Joan A. Abernathy, and Donna A. Gaines, pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in this case.

## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals, reported at 339 A.2d 46, and the unreported opinion of the Superior Court of the District of Columbia, are reproduced in the appendices to this petition.

## JURISDICTION

The order of the Court of Appeals was entered on May 22, 1975 and a timely petition for rehearing *en banc* was denied on July 14, 1975. Time to file this petition for certiorari was extended to December 11, 1975, by order of the Chief Justice entered on September 26, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

1. Whether D.C. Code, §22-2701 (1973 Ed.) making solicitation for prostitution a criminal offense violates the First Amendment's guarantee of freedom of speech.

2. Whether the statute is vague and overbroad, in violation of the First, Fifth and Sixth Amendments, in its use of such terms as "enticing" and "prostitution" and because it covers all such proposals, direct and indirect, regardless of time, place or other circumstance.

3. Whether the statute, as applied, violates the First Amendment in that it is enforced exclusively by police decoys under circumstances incapable of producing lawless action.

4. Whether if the speech is treated as an inchoate crime preparatory to prostitution it denies substantive due process and violates the constitutional right to privacy.



5. Whether application of the statute's prostitution provision exclusively against women denies them the equal protection guaranteed by the due process clause of the Fifth Amendment.

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution. The statute involved is D.C. Code, §22-2701 (1973 Ed.) which provides as follows:

> It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading, any person or persons sixteen years of age or over in the District of Columbia, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both.

## STATEMENT OF THE CASE

Petitioners were charged with soliciting for prostitution in violation of D.C. Code §22-2701 (herein referred to as "the statute"). The Superior Court, after preliminary hearing, dismissed the informations on the grounds that the statute violated petitioners' rights to privacy and freedom of speech. The Court also held that the enforcement policy of the Metropolitan Police violated petitioners' right to equal protection.

The District of Columbia Court of Appeals reversed, holding that (1) there is no constitutional right to privacy where solicitations occur in a public place, and (2) a solicitation for prostitution is not entitled to immunity under the First Amendment. The Court conceded that "the speech condemned is not the type intended or likely to produce imminent lawless action or violence", 339 A.2d 46, 51 (D.C. App. 1975), but held that the prohibition against solicitation was reasonable because "regulation of business conditions and commercial ventures long has been recognized to be a valid exercise of police power." 339 A.2d at 53. In addition, the Court determined that there is "a legitimate national state and community interest in maintaining a decent society" and held that "the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest", *Id.* at 54.

The Court of Appeals did not dispute the trial court's finding that only women are arrested for such solicitation. It held, however, that the policy was not discriminatory because males proposing sodomy to other males are arrested under §22-2701 for the different offense of "soliciting for other lewd or immoral purposes." *Id.* at 55.

## REASONS FOR GRANTING THE WRIT

1. The statute violates the First Amendment's guarantee of freedom of speech by making it criminal to propose private sexual intercourse for pay. Neither §22-2701 nor any other District of Columbia statute makes prostitution itself criminal. But there can be no "criminal solicitation" if the activity solicited is in itself lawful. While solicitation to commit a crime may be properly proscribed, the District of Columbia cannot punish mere speech which solicits another to commit an act which is itself not a



crime. Accordingly, the invitation to engage in prostitution is constitutionally protected speech, (*Terminiello v. Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516, 539-540 (1945)) falling under none of the categories susceptible to prohibition, e.g. obscenity (*Roth v. United States*, 354 U.S. 476 (1957)), fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), or imminent incitement to illegal action (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

2. This statute curtailing speech alone presents two additional problems of facial unconstitutionality.

(a) The defect of vagueness arises from the ambiguity of such undefined terms as "enticing" and "prostitution." Accordingly, it does not meet the Court's requirement of clarity in criminal laws, *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "Entice" obviously includes non-verbal conduct which is regarded as alluring. See I Shorter Oxford Dictionary (1947), p. 617; Black's Law Dictionary (rev. 4th Ed., 1968), p. 626, and the statute contains no definition of prostitution.

(b) Further, the statute is unconstitutionally overbroad in proscribing any conversation leading to prostitution, regardless of the circumstances. This would include private conversations in the home between consenting adults. It is not a regulation with "narrow specificity", (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)) and thus fails to meet this Court's test of "reasonable time, place and manner of regulation" (*Ernoznick v. City of Jacksonville*, ___ U.S. ___, 95 S.Ct. 2268, 2272-3 (1975)). Hence, it is broader than any justifiable governmental interest would warrant. See also, *Cohen v. California*, 403 U.S. 15 (1971).

3. This case, not atypical, presents the additional question of whether the statute, as applied, is unconstitutional under the First Amendment. The invitation is made to a police officer whose intention is to entrap the defendant not to consummate the act of prostitution. Indeed, of the 550 arrests made for the offense of solicitation for purposes of prostitution in the District of Columbia during 1973, all were of women, and all were made by male undercover police officers. *United States v. Wilson*, 342 A. 2d 27, 30 n. 5 (D.C. App. 1975). The resulting constitutional problem is not that of entrapment (see *United States v. Russell*, 411 U.S. 423 (1973)) but whether "such advocacy" is ". . . directed to inciting or producing imminent lawless action and is likely to produce such action", *Brandenburg v. Ohio, supra*, n. 1 at 447. The American Law Institute notes that "insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses." Modern Penal Code, §250.1, Comment (Tent. Draft No. 13, 1961). See also, *Williams v. District of Columbia*, 419 F.2d 638, 646, n. 23 (D.C. Cir. 1969).

4. The monetary aspect of the speech here in question does not remove it from First Amendment protection. The reliance of the court below upon *Valentine v. Christensen*, 316 U.S. 52 (1942) was misplaced. In *Bigelow v. Virginia*, ____ U.S. ____, 95 S.Ct. 2222, 2235 (1975), this Court held that simply because the speech involved has commercial aspects "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against a public interest allegedly served by the regulation." The cases relied upon by the Court below



in lieu of the required balancing process are clearly distinguishable. Unlike *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 371 (1973), the advertised activity here is not illegal, and unlike *Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973), the speech is not obscene.

While certain limitations on advertising have been upheld, see e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this is very different from the outright prohibition imposed by §22-2701. Such prohibition must be subjected to careful scrutiny; any regulation of speech protected by the First Amendment must be tailored to the exigencies involved.

5. The statute violates the due process clause of the Fifth Amendment and the constitutional right of privacy even if solicitation is assumed to be an inchoate offense leading to the act of prostitution.

Substantive due process prevents the state from making conduct criminal unless it constitutes an injury to society of which the state can take cognizance. See Packer, *The Limits of the Criminal Sanction* (1968), *passim*. This principle is reflected in such cases as *Robinson v. State of California*, 370 U.S. 660 (1962), involving the cruel and unusual punishment clause, and *Thompson v. Louisville*, 362 U.S. 199 (1960) where the Court held that it is a violation of due process to convict and impose punishment without evidence of guilt. See also *Gregory v. Chicago*, 394 U.S. 111 (1969).

Prostitution historically has been made criminal on the assumption that it is attended by evils which the state is entitled to prevent. While these evils were not enumerated by the court below to support its decision,

the Superior Court here effectively disposed of their supposed connection with prostitution. (Appendix, p. ). But even if they were by-products of prostitution, the constitutional way to meet them is by legislation directed to those evils, not by outright criminalization.

The counterpart to substantive due process is the constitutional right of privacy, as applied during the last decade to the sexual area, which includes the right to make personal decisions relating to one's sexual life. *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), *Loving v. Virginia*, 388 U.S. 1 (1967), *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Prostitution, too, should be treated as a private consensual matter between individuals who are entitled to decide upon the control of their bodies. See, *e.g.*, Rosenbleet and Pariente, The Prostitution of the Criminal Law, 11 *Amer. Crim. Law Rev.* 373, 420 (1973). Contrary to the assertion of the court below, the right to privacy is not lost because the conduct, or some portion of it, occurs in public. See *Paris Adult Theater, supra.*

Where the fundamental right to privacy is invaded by governmental action, that action must be supported by some compelling interest on the part of the government. The burden was not met by the government in this case. Nor was the right of privacy in recent sex cases lost because of their business aspects. Hence, although contraceptives are sold, their use is constitutionally protected (*Griswold v. Connecticut, supra; Eisenstadt v. Baird, supra,* at 453) and although a physician may charge a fee for an abortion, a woman has a right to terminate her pregnancy (*Roe v. Wade*, 410 U.S. 113). Similarly, the fact



that a customer pays for sexual services, does not change the constitutional protection for the sexual activities which are involved.

6. The statute, as applied, violates Petitioners' right to the equal protection of the laws embodied in the Fifth Amendment in that only women are prosecuted for solicitation. This unequal application is recognized in the decisions of both courts below in this case and in the appellate court's opinion in *United States v. Wilson*, 342 A.2d 27 (D.C. App. 1975). There the government sought to justify the discriminatory application of the statute by "the scarcity of women undercover officers" and an alleged rule among street walkers is that "the women first must name the act and price." (*Id.* at 29) Such an administrative convenience is entitled to even less deference than the legislation held to violate the Equal Protection clause. See *Reed v. Reed*, 401 U.S. 71, 76 (1971). The Court of Appeals should have inquired into whether there was a compelling state interest which could justify the discriminatory enforcement of §22-2701.

Finally, the police practices discussed above usurp the legislative function by defining the nature of the crime as one committed only by women. This practice which arises from vague laws so inherently arbitrary and discriminatory is in violation of due process. *Papachristou v. City of Jacksonville*, 382 U.S. 87 (1972); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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